

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

TRI-STATE WHOLESALE  
BUILDING SUPPLIES, INC.,

:

:

Petitioner

vs.

:

NATIONAL LABOR RELATIONS  
BOARD,

:

:

Respondent

Case Nos. 15-1616, 15-1678

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**TRI-STATE WHOLESALE BUILDING SUPPLIES’ MEMORANDUM IN  
RESPONSE TO THE NLRB’S MOTION TO STRIKE  
PART OF ITS REPLY BRIEF**

Tri-State Wholesale Building Supplies (the “Company”), through its counsel, responds to the NLRB’s Motion to Strike part of its reply brief as follows.

In its motion, the NLRB fails to accurately describe both the relevant case law and the Company’s exceptions to the Board. As shown more fully below, the Company in its reply brief is advancing the arguments it made in its exceptions to the ALJ’s decision and in its opening brief to this Court. Moreover, in the section of the Company’s reply brief to which the NLRB objects, the Company is responding to new arguments and new case law cited by the NLRB in its opening brief to this Court, i.e., arguments and case law not relied upon either by the ALJ

or by the Board in their respective decisions. This is precisely the purpose of reply briefs. The NLRB's discomfort with the fact that the Company's reply brief shows that its newly raised arguments and case law are wide of the mark is not grounds to strike the Company's reply brief. The NLRB's motion should be denied.

First, Section 10(e) of the Act, 29 U.S.C. 160(e), requires that for an "objection" to be considered by a Court of Appeals, it must have first been "urged" before the Board. The purpose of this provision is to provide the Board with the opportunity to consider on the merits those questions that may later be addressed by a Court of Appeals. *NLRB v. Triec, Inc.*, 946 F.3d 895, 1991 WL 216465 at \*6 (6<sup>th</sup> Cir. 1991). This does not require that objections be stated with great specificity in order to preserve issues for appeal. All that is necessary is that the Board have notice that the general issue may be appealed. Thus, for example, in *May Department Stores v. NLRB*, 326 U.S. 376, 386 n. 5 (1945), the Supreme Court held that a vague exception—that a paragraph including a cease and desist order was "not supported or justified by the record"—was sufficient to preserve for appeal the issue of the scope of that order. This Court in *NLRB v. Triec, Inc.*, supra at \*6 similarly found that the employer's exception "implied" the issue the employer raised on appeal. Thus, where Courts have found that Section 10(e) of the Act renders an employer's objections insufficient to preserve an issue on appeal, it has been where the objections were "general pro forma objections found

to be impermissibly vague.” *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1478 (7<sup>th</sup> Cir. 1992), quoting *NLRB v. Blake Const. Co. Inc.*, 663 F.2d 272, 284 (D.C. Cir. 1981) (employer exceptions regarding the scope of the complaint, the lack of proof regarding a contract, and the refusal of an ALJ to allow certain cross-examination, found sufficient to preserve a due process argument on appeal, despite the fact that the exceptions did not specifically mention due process). See also *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981). Finally, these cases also hold that an employer’s exceptions cannot be read in isolation, but must be understood in the context of the arguments the employer makes in connection with those exceptions.

Second, here the ALJ found that the Company’s January 12 letter illegally discharged the strikers. The ALJ’s rationale for this conclusion was that the wording of the letter would have led the strikers to conclude that they had been fired, and that “by telling them that they would not necessarily be entitled to reinstatement if any of the replacement employees left the company, [the Company] disabused them of any belief that they were merely being replaced.” (A. 43).

In its exceptions to the ALJ’s decision, the Company specifically objected to the ALJ’s finding that the January 12 letter discharged the strikers. (A. 9-10). Before the Board, the Company made numerous arguments in support of this

exception. It argued that the ALJ erred in concluding that the letter would reasonably cause the strikers to conclude that they had been discharged, and further erred in concluding that the letter was inconsistent with the rights of economic strikers; the distinction between discharge and permanent replacement was a technicality that would be lost on the strikers; and the Company's letter was reasonably accurate in indicating that the striker's right to reinstatement would be determined at the time a replacement left the Company.

A comparison of the Company's exceptions and the portion of the Company's reply brief at issue shows that the arguments in the reply brief are fully within the scope of the exceptions. In the section of the reply brief at issue, the Company advances the following arguments: an employer has a right to truthfully advise employees regarding the potential risks of protected, concerted activity; an employer can lawfully address with strikers the subject of striker replacements without having to detail all of their protections as strikers; the Company's January 12 letter reasonably accurately described the strikers' rights as permanently replaced economic strikers; and any conclusion by the strikers that they had been discharged by the January 12 letter would have been the result of the narrow and technical distinction between permanent replacement and discharge. All of these arguments are clearly implicated by the Company's exceptions.

Third, the NLRB ignores the fact that the section of the Company's reply brief at issue is in explicit response to new cases and new arguments made by the NLRB in its opening brief. Thus, at page 23 in its opening brief, the NLRB argues that where the employer creates ambiguity that would reasonably cause employees to question whether they had been discharged, the burden of that ambiguity falls on the employer. It further argues that the employer will be held responsible when its statements or conduct creates an uncertain situation for the employees. The NLRB cited several cases in support of these arguments. These arguments and the cited cases are new to this case. They were not referenced in the ALJ's decision or in the Board's decision.

In the section of the Company's reply brief at issue, the Company explicitly indicated that it was responding to these new arguments and cases. Reply Br. p. 7. This is fully appropriate in a reply brief. See *U.S. v. Campbell*, 279 F.3d 392, 401 (6<sup>th</sup> Cir. 2005); *U.S. v. Crozier*, 259 F.3d 509, 517 (6<sup>th</sup> Cir. 2001). Essentially, the NLRB wants to advance its new arguments and cite new case law in its brief, while depriving the Company of any opportunity to respond. That is not right.

Fourth, the NLRB is correct that the Company did not cite to Section 8(c) of the Act (29 U.S.C. 158(c)) in its exceptions to the ALJ's decision. But the above case law shows that Section 10(e) does not require that exceptions explicitly cite statutes, case law, or even legal theory. It is sufficient that the issues raised on

appeal are reasonably implied by the employer's exceptions and supporting arguments.

This requirement is clearly satisfied here. The Company's arguments in its exceptions—the ALJ erroneously concluded that the language of January 12 letter would reasonably cause the strikers to believe that they had been discharged, the ALJ erroneously found that the January 12 letter was inconsistent with the rights of economic strikers, the distinction between discharge and permanent replacement is technical and likely to be lost on the strikers, and the January 12 letter was a reasonably accurate statement of the strikers' status as permanently replaced economic strikers—all implicate the free speech rights guaranteed in Section 8(c) of the Act. Further, those arguments also implicate the case law under Section 8(c) cited in the reply brief that an employer may address the subject of striker replacement without fully detailing a striker's reinstatement rights, as well as the Board's stated policy of resolving in the employer's favor any ambiguity in the employer's statements to employees about permanent replacement. Reply Br. 8. This implication is particularly compelling since the NLRB is not naive: it must be expected to be aware of the provisions of the Act such as Section 8(c), not to mention its own decisions interpreting the Act.

Fifth, the NLRB erroneously contends (Motion p. 2) that the Company's reliance in its reply brief on the case law under Section 8(c) of the Act is an

eleventh-hour resort to a new contention. As the analysis above shows, it is not a new contention at all. It is at most an extension of the Company's previous arguments, an extension brought about by the NLRB's own advancement of new arguments, and new case law in its opening brief to this Court.

Finally, the NLRB argues (Motion, pp. 4 -5) that under FRAP 28(a)(8), the Company waived any reliance on Section 8(c) by failing to address it in its opening brief. This argument lacks merit. The above analysis shows beyond any doubt that the Company's arguments at pages 14–20 of its opening brief fully raised the key issue here: the Company's January 12 letter was a reasonably accurate and lawful statement of the strikers' rights after their having been permanently replaced. The Company's discussion in its reply brief of case law under Section 8(c) is a logical and permissible extension of that argument in response to the new arguments and new case law relied upon by the NLRB in its opening brief. As indicated above, this is the proper role of a reply brief.

For the foregoing reasons, the NLRB's Motion to Strike must be denied.

Respectfully submitted,

/s/ Edward S. Dorsey

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**CERTIFICATE OF SERVICE**

I certify that the foregoing has been served on counsel of record via the Court's ECF system this 25th day of November, 2015.

/s/ Edward S. Dorsey

Edward S. Dorsey

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